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IN THE

Supreme Court of the United States.

October Term, 1906

No. 256.

WATSON STEWART, *Appellant,*

v.

THE UNITED STATES

and the

OSAGE NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellant.

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BRIEF FOR APPELLANT.

I. Statement of the Case.

This suit was brought in the Court of Claims by authority of section 13 of the Indian Appropriation Act for the year ending June 30, 1904, approved March 3, 1903 (32 Stat. L. 1010, 1011), set forth in full in the petition, Record, p. 1.

The claimant, Watson Stewart, was register of the land office at Humboldt, Kansas, from May 12, 1869, to Novomber 20, 1871. While serving in that office he was required by the Secretary of the Interior to render services in the sale and disposal of lands ceded by the Osage Indians by article 1 of the treaty concluded September 29, 1865; of lands held in trust for those Indians under article 2, and of lands included within their diminished reservation under article 16, which diminished reservation was to be disposed of for the same purpose as the trust lands.

The material provisions of the treaty are set forth in the petition, paragraph 6, Record, p. 2.

The statutes authorizing the sale of the lands are set forth in the petition, paragraphs 7, 8, 9, Record, p. 3.

The lands ceded by article 1 were to be sold for cash; no pre-emption claim or homestead settlement to be recognized. Three hundred thousand dollars ($300,000) of the proceeds of the sale were to be placed to the credit of the Indians to reimburse the United States for an advance of that amount to them, and the remainder to be placed in the Treasury to the credit of the "civilization fund," to be used for the education and civilization of the Indian tribes (1819, March 3, ch. 85, 3 Stat. L. 516).

In article 1 of the treaty it is provided (Petition, par. 6, Record, p. 2):

"And after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

In article 2 it is provided (Petition, Record, top p. 3):

"The proceeds of such sales, as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians," etc.

In article 16 it is provided (Petition, Record, p. 3):

"The diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands."

The proceeds of the sale of the ceded lands were over one million dollars. Those of the trust and diminished reserve lands were over nine million six hundred thousand dollars (Finding V, Record, p. 12).

The Revised Statutes provides as follows:

"Section 2238. Registers and receivers, in addition to their salaries, shall be allowed each the following fees and commissions, namely:

"First. A fee of one dollar for each declaratory statement filed and for services in acting on pre-emption claims.

"Second. A commission of one per centum on all moneys received at each receiver's office."

Section 2237 allows each register and receiver an annual salary of $500. Section 2240 provides that the compensation of registers and receivers including salary, fees and commissions shall in no case exceed in the aggregate $3,000 each, and section 2241 provides that whenever the amount of compensation exceeds the maximum, the excess shall be paid into the Treasury as other public moneys.

The appellant received his maximum compensation of $3,000 each year that he was in service. (Finding IV, table top of page 12.) This was made up almost wholly from the public lands, though a slight amount was added from the Osage lands to make up the maximum during his first fractional year and last fractional year of service. (Finding IV, table foot of page 11.)

The instructions given by the Department to the claimant and other land officers in Kansas fix the value of their services in the disposal of these lands at the same amounts, though the instructions limit the total compensation to the maximum fixed by Rev. Stat. Sec. 2240, as shown below.

The instructions of December 19, 1867, contain the following:

"The register and receiver will be allowed a commission of one per cent each on the proceeds of the sales of these lands, with limitation as a matter of course to the

legal maximum of $2,500 of commissions and fees, inclusive, etc., on the disposal of the public lands, the payment of which is to be made by the receiver in his capacity of disbursing agent and to be debited in a special account, together with such other expenses incident to the sale of the lands alluded to as may be authorized by law and instructions." (Instructions of General Land Office, Record, top p. 9.)

Those of March 28, 1871, contain the following:

"The officers will be allowed the same fee for filing as is allowed under the pre-emption laws, viz: $1.00 to each officer; this fee the receiver will account for in his receiver's account of public lands, stating the item as 'fees' for (number) declaratory statements filed on Osage Indian Trust and Diminished Reserve Lands. They will also be allowed a commission of one per cent on the cash value of the lands sold.

"The receiver will render his account of these Indian lands in the following manner, to-wit:

"He will in his receiver's account credit the United States with all moneys received during the quarter from the sale of the land and charge the United States with the amount deposited and the amount of authorized disbursements for the quarter. In his disbursing account he will charge the United States with the authorized disbursements and credit the U. S. the said amount as carried to the receiver's account and therein charged. Voucher for payments must accompany the disbursement account, otherwise they will be disallowed. Nothing, however, shall be herein construed as authorizing the register and receiver to receive more than the maximum fees and commissions of $2,500 per annum now allowed by law, and the receiver in adjusting his account will take care to first ascertain how much short of the maximum the receipt from public lands, inclusive the fees received from declaratory statements on the Osage lands, will bring their fees and commissions and will then charge the Indian fund only so much commissions as will bring their compensation to the maximum." (Instructions of General Land Office, Record, pp. 9, 10.)

The filing fees of two dollars (one dollar to the register and one dollar to the receiver) for each declaratory statement paid by the purchasers of the lands were covered into the United States Treasury.

The Government now holds about eight and one-third million dollars in trust for the Osages, interest on which at five per cent is annually paid to them, amounting to nearly half a million dollars. (Finding V, Record, p. 12.)

This suit was brought to recover a commission of one per cent on the amount of the sales of the lands and the filing fees now in the Treasury as a reasonable compensation for the services of the claimant in the sale of these lands as outside of and in addition to his regular official duties in the sale of public lands.

The Court of Claims decided adversely to the claim and dismissed the petition. The grounds of this decision are stated in the opinion by Judge Wright, Record, pp. 12 to 15. The following sentence contains the gist of the decision, Record, p. 15:

"Having voluntarily assumed to discharge all the duties of the office, he must be presumed to have known what the duties were, and that the services for which he now seeks further compensation were engagements included in his acceptance of the office at the time when he entered upon the performance of its duties, which is further evidenced by his continued service without objection, and for the designated compensation."

From this judgment, the claimant, Watson Stewart, appealed, Record, pp. 15, 16.

II. Assignment of Error.

The appellant hereby assigns for error that the Court of Claims held that he was entitled to no additional compensation for the sale of the Osage ceded trust and diminished reserve lands, and dismissed his petition; whereas

said court should have held that he was entitled to such additional compensation and should have given judgment in his favor.

III. Brief of Argument.

The Question Adjudicated.

The right of registers and receivers to a reasonable compensation for the sale of Indian lands under treaties similar to that of 1865 with the Great and Little Osage Indians has been settled and adjudicated by this court. We therefore quote the material part of the opinion of this court upon which we rely. We shall then show that that opinion has been followed both by this court and by other courts in the disposition of similar cases as well as by special acts of Congress for the relief of other officers similarly situated.

The Brindle Case.

The case of *United States* v. *Brindle* (110 U. S. 688) came before this court under the provisions of the Act of 1878, June 10, Chap. 179 (20 Stat. L. 541) authorizing a full settlement of accounts on both sides in an action brought by the United States against the late receiver of the Pawnee Land District in Kansas.

The report of this case in 110 U. S. makes no reference to the special act governing it. That act provided, among other things:

"And in the trial of said cause the said court shall hear and determine all disputes and differences between the United States and the said William Brindle in reference to his various accounts as receiver and acting disbursing agent of public money in the Pawnee land district in Kansas, and also in relation to his accounts as special receiver of Indian trust moneys received and expended under the Indian treaties of May sixth and May

thirtieth, eighteen hundred and fifty-four, as well under said Indian treaties as under the laws of the United States; and the said William Brindle, in the trial of said cause, shall be permitted and be entitled to make defense and claim set-off in his favor in said court, if said court shall determine him to be entitled thereto, with the same effect as if said suit were commenced by an individual against the said William Brindle, and said set-off shall not be barred by any statute of limitations." 20 Stat. L. 541.

In the opinion of this court delivered by Mr. Chief Justice Waite, it is said:

"The facts on which the claim for commissions on sales of Indian trust lands depend are these:

"On the 17th of July, 1854, a treaty was concluded with the Delaware tribe of Indians, 10 Stat. 1048, the material parts of which are as follows:

"'Art. 1. The Delaware tribe of Indians hereby cede, relinquish and quit-claim to the United States all their right, title, and interest in and to their country,' describing it, and also their right, title, and interest in what was then known as 'the outlet.'

"'Art. 2. The United States hereby agree to have the ceded country (excepting the said "outlet"), surveyed, as soon as it can be conveniently done, in the same manner that the public lands are surveyed, such survey to be commenced and prosecuted as the President of the United States may deem best. And the said President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale, at public auction, in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of public lands; and such of the lands as may not be sold at the public sales, shall thereafter be subject to private entry, in the same manner that private entries are made of United States lands; and any, or all, of such lands as remain unsold after being three years subject to private entry, at the minimum government price, may, by act of Congress, be graduated and reduced in price, until all

said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares, and also to the speedy settlement of the country.

"'Art. 3. The United States agree to pay to the Delaware tribe of Indians the sum of ten thousand dollars; and, in consideration thereof, the Delaware tribe of Indians hereby cede, release and quit-claim to the United States, the said tract of country hereinbefore described as the "outlet." And as a further and full compensation for the cession made by the first article, the United States agree to pay to said tribe all the moneys received from the sale of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing and selling the same.'

"Another article provided for the permanent investment of such of the proceeds as were not required for the present wants of the Indians, and for the disposition of the interest on the investments.

"On the 10th of August, in the same year, the Kaskaskias, and Peorias, and certain tribes of the Piankeshaw and Wea Indians, ceded certain of their lands to the United States, by a treaty the same in its general provisions as that of the Delawares. 10 Stat. 1082.

"Section 5 of the act of March 3, 1855, c. 204, 10 Stat. 700, passed after these treaties were concluded, is as follows:

"'That to enable the President of the United States to carry out, in good faith, the recent treaties with the * * * Delawares * * * and the United tribes of Kaskaskias and Peorias, Piankeshaws and Weas * * * there shall be, and hereby is, appropriated, the sum of twenty thousand dollars, in addition to the appropriations heretofore made, for the execution of the surveys required by said treaties; and where the net proceeds of the lands ceded by either of said treaties are required to be paid over to the Indians, the President shall cause said lands, or such parts thereof as he may deem proper to be classified and valued, and when such classification and valuation have been made to his satisfaction, he shall cause said lands to be offered at public sale, by legal subdivisions or town lots, at such times and places and in such manner and

quantity, as to him shall appear proper and necessary to carry out faithfully the stipulation in said treaties; and said lands shall not be sold at private sale for a less price than that fixed by the valuation aforesaid, nor shall any land be sold at a less price than one dollar and twenty-five cents per acre, for three years, and thereafter as may be directed by law pursuant to the treaty.'

"By an act of July 9, c. 174, 4 Stat. 564, as afterwards amended, and now section 463 of the Revised Statutes, the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, has the management of Indian Affairs, and of all matters arising out of Indian relations. The same act (now section 462 Rev. Stat.) also provides that all accounts and vouchers for claims and disbursements connected with Indian affairs shall be transmitted to the commissioner for administrative examination, and by him passed to the proper accounting officer of the Treasury Department for settlement. The Second Auditor of the Treasury is charged by law with the duty of receiving and examining all accounts relating to Indian affairs and transmitting them to the second comptroller for his decision thereon. Rev. Stat., section 277, subdivision second.

"There must be appointed a register of the land office and a receiver of public moneys for each land district established by law, to reside at the place where the land office to which he is appointed is kept. Rev. Stat., sections 2234, 2235, re-enacting other statutes to the same effect.

"The Commissioner of the General Land Office has power to audit and settle all public accounts relating to the public lands, and to transmit the accounts and vouchers to the First Comptroller of the Treasury for his examination and decision thereon. Rev. Stat., section 456.

"Section 18 of the act of August 31, 1852, 'making appropriations for the civil and diplomatic expenses of the Government,' c. 108, 10 Stat. 100, is as follows:

"'No person hereafter who holds or shall hold, any office under the Government of the United States, whose salary or annual compensation shall amount to the sum

of two thousand five hundred dollars shall receive compensation for discharging the duties of any other office.'

"On the 24th of October, 1856, Brindle, the defendant in error, 'was duly appointed special receiver and superintendent to assist the special commissioner to dispose of the Delaware Indian trust lands at Fort Leavenworth, in the Territory of Kansas, under the treaty with the Delaware tribe of Indians.' On the 18th of February, 1857, he was appointed and commissioned for four years as receiver of public moneys for the district of lands subject to sale at Lecompton, Kansas, and on the 15th of May, 1857, he was duly appointed as special receiver and superintendent to assist the special commissioner to dispose of the trust lands of the Kaskaskia and Peoria, Piankeshaw and Wea Indian confederated tribes of Indians at Paoli, Kansas Territory.

"These Indian trust lands were never public lands of the United States, and were never subject to sale at the Lecompton land office. The cessions to the United States were in trust, to survey, manage and sell the lands and pay the net proceeds to or invest them for the Indians. There was never a time that the United States occupied any other position under the cessions than that of trustees, with power to sell for the benefit of the Indians. In equity, under the operation of the treaties, the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust. Of this, we have no doubt. The treaties are full of evidence to that effect. It is unnecessary to state it in detail.

"It follows that it was never any part of the official duty of Brindle, as receiver of public moneys at the Lecompton land office, to sell the trust lands or receive payments therefor. His duties in connection with that office were to receive and account for moneys paid for public lands, that is to say, the public moneys of the United States derived from the sales of public lands. The moneys paid for the Indian lands were trust moneys, not public moneys. They were at all times in equity the moneys of the Indians, subject only to the expenses incurred by the United States for surveying, managing, and selling the lands.

"When, therefore, Brindle was appointed special receiver and superintendent, to assist the special commissioner in disposing of the trust lands, he was employed to render a service in no way connected with the office he held. He was not appointed to any office known to the law. No new duty was imposed on him as receiver of the land office. The President was, both by the treaties and the act of 1855, charged with the duty of selling the lands, and under his instructions Brindle was employed to assist in that work. By express provisions in the treaties the expenses incurred by the United States in making the sales were to be paid from the proceeds. This clearly implied the payment of a reasonable compensation for the services of those employed to carry the trust into effect.

"In *Converse* v. *United States*, 21 How. 463, it was decided that provisions in appropriation acts, like section 18 of the act of August 31, 1852, prohibiting an officer from receiving more than one salary, could not by 'fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law' p. 471. In the present case the employment was for a special service in connection with a special trust assumed by the United States for the benefit of certain Indian tribes, in which express provisions were made for the payment of expenses. In legal effect, the appointment was to an agency for the sale of lands for the Indians, with an implied understanding that a reasonable compensation would be paid for the services rendered. So far as anything appears in the record, the appointment was not made because Brindle was a receiver of the land office. The duties to be performed were of a different character and at a different place from those of the land office, and while the exact amount of compensation for this service was not fixed, it was clearly to be inferred that such compensation as the law implies where labor is performed by one at the request of another, that is to say, a reasonable compensation, would be paid.

This case comes, therefore, within the rule of *Converse* v. *United States*, and Brindle is not excluded by the act of 1852 from demanding compensation for this service by reason of his being receiver of the land office.

* * * * * * *

"The judgment is therefore reversed, and the cause remanded with instructions to enter another judgment in favor of the defendant in error in accordance with the finding G; that is to say, for $14,541.78, as of June 13, 1879, the date of the verdict, the judgment to draw interest from that date."

Cases Following the Brindle Case.

In *United States* v. *Saunders* (120 U. S. 126, 130) the court construes the case above quoted as follows.

"The case of *United States* v. *Brindle*, 110 U. S. 688, in which an Indian agent received large additional compensation for services connected with the sale of lands belonging to the Indians of his agency, which was affirmed in this court, was upon the ground that these additional services were performed for the benefit of the Indians and the statute implied the payment of a reasonable compensation for such services."

Meigs v. *United States* (19 C. Cls. 497, 503, 504) thus more accurately summarizes the decision:

"A receiver of public moneys in Kansas was appointed agent for the sale of Indian trust lands under a treaty with an Indian tribe; and the court, citing the second sentence of this quotation from the decision in the previous case, held that he was entitled to commissions on those sales, in addition to the full compensation as receiver allowed him by law. And in regard to the matter of his compensation, the court ruled that while the exact amount of it was not fixed, 'it was clearly to be inferred that such compensation as the law implies where labor is to be performed by one at the request of another, that is to say, a reasonable compensation would be paid.'"

Even more directly in point as a case decided on the authority of the *Brindle* case is *United States* v. *Rogers* (81 Fed. Rep. 941).

In that case certain lands had been ceded by the Indians to the United States to be sold and the proceeds to be deposited in the Treasury of the United States to the credit of the Indians. The action was against the sureties on the receiver's bond for failure to account for such proceeds.

The court said (p. 943):

"The lands thus relinquished to the United States for the purposes stated were not public lands subject to sale at the land office at which Danilson was receiver. Their relinquishment, like the cessions involved in *United States* v. *Brindle*, 110 U. S. 688, was made to the Government in trust to survey and sell the lands, and pay the net proceeds to, or invest them for the Indians. What was said by the Supreme Court in the case cited in respect to the receiver of public moneys at the Lecompton land office is equally applicable here. It was never any part of the duty of Danilson, as receiver of public moneys at the Blackfoot land office, to sell the trust lands, or receive the payments therefor. His duties in connection with that office, 'were to receive and account for moneys paid for public lands; that is to say, the public moneys of the United States derived from the sales of public lands. The moneys paid for the Indian lands were trust moneys, not public moneys. They were at all times, in equity, the moneys of the Indians, subject only to the expenses incurred by the United States for surveying, managing and selling the land.' These trust moneys constituted no part of the public moneys or property for which the defendants, as sureties upon the bond of Danilson, became responsible."

The *Brindle* case has also been made a basis of action by Congress in legislation for the payment of claims of similar officers making sales of lands of Indians. (See

the act for the relief of John W. Whitfield, 27 Stat. L. 768, and the act for the relief of Moore and Woodson, 28 Stat. L. 580.)

Distinction in Opinion of Court Below.

The opinion of the learned court below in comparing this case with that of Brindle from which we have so fully quoted, distinguishes it, Record, pp. 14, 15, in the fact that the instructions given by the General Land Office under the authority of the Secretary of the Interior, Finding II, Record, pp. 7 to 10, imposed these duties upon him as a portion of the duties of his office, and that as he accepted the office after some of these duties were imposed upon him by the circulars of the General Land Office while others relating to the diminished reserve, were imposed upon him during his term of office, pp. 9, 10, and he proceeded to render the services, he has no claim for any additional compensation. The instructions given to the appellant under them are, in effect, treated as constituting a contract to perform the duties imposed upon him without other or additional compensation than that given by the law for strictly official services. The response to this view is:

1. That the instructions of the Department did not and could not constitute a contract and were not intended as such. They constituted simply an official ruling that the duties involved in the sale of these lands were strictly official duties, a ruling which must be regarded in the light of the decision in the *Brindle* case as erroneous.

2. That the terms of the act of Congress referring the claim to the Court of Claims quoted, Record, p. 1, preclude any defense arising from the voluntary performance of the service under the instructions given at the time without the appellant then objecting to that view, and require the Court of Claims "to render judgment thereon on the merits."

Department Ruling Not Conclusive.

Looking at the instructions, Record, pp. 7 to 11, it will be seen that they throughout proceeded upon the theory that the lands, the sale of which was imposed upon the appellant in common with all other registers and receivers, were public lands of the United States.

The instructions of the Secretary of the Interior so far as they related to the question of compensation contained not a proposal to the claimant to enter into a contract, but an official ruling and an erroneous one at that. Where officers of the Government in good faith comply with such rulings of their superior officers, they lose no rights by so doing. They are not bound to put themselves in the position of contentious and disobedient officers. Their compliance with their instructions, so far from constituting an agreement to a contract, express or implied, puts them in a position peculiarly favorable for the assertion of their rights in the courts in opposition to such rulings where the rulings are found to be erroneous. This was decided by this court in *United States* v. *Lawson*, and *United States* v. *Ellsworth*, 101 U. S. 164, 170.

The following remarks in the *Lawson* case might well have been written of the present case:

"Confessedly, the order was official and peremptory, and under such circumstances it may well be inferred that the party felt that, if he refused to obey, the refusal would cost him his commission. Had he refused to comply with the order or entered a protest, his act might have been regarded as contumacious, and have proved as injurious in its consequences to the incumbent of the office as if he had declined to discharge the ordinary duties of the collector. Viewed in the light of the attending circumstances, and especially of the fact that the order came from the Commissioner of the Customs, to whom he was immediately responsible, we can not hold that the payments were voluntary, within the meaning of

the judicial rule, which, in consequence of the payment, denies to the party making the same the right to recover it back." (*United States* v. *Lawson*, 101 U. S. 169.)

The same principle has been many times followed. *Swift Co.* v. *United States*, 111 U. S. 22, 29; *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 23; *United States* v. *Mosby*, 133 U. S. 273, 279; *United States* v. *Post*, 148 U. S. 124, 133; *Glavey* v. *United States*, 182 U. S. 595.

The official ruling of the Department of the Interior, therefore, made before the time of these sales was no more conclusive against the right of the claimant to recover in this suit than are the rulings made by the Interior and Treasury Departments since. They are simply departmental decisions binding neither party when the matter comes to be litigated in the courts of law.

These departmental rulings are plainly within the reviewing power of the Court of Claims under its general jurisdiction, as shown in *Medbury* v. *United States* (173 U. S. 492), and much more so under the terms of the jurisdictional statute under which the case comes here.

The error of the instructions of the Secretary of the Interior consisted in ignoring the trust character of the lands, and in treating them, so far as compensation of the land officers was concerned, as a part of the public lands. It is this error which we have the right to ask the court to correct in this proceeding under the authority conferred by the jurisdictional act of 1903, and in the light of judicial decision rendered subsequently to the performance of the services.

Construction of the Act of Congress.

The terms of the act of Congress, Record, p. 1, preclude the defense which has been sustained in the decision of the Court of Claims. The very object of the refer-

ence was to obtain a ruling whether the services in the sale of these lands were additional to the duties imposed upon the appellant by the terms of his commission. This object would be defeated by holding that the ruling of the department on that subject is conclusive. We have shown that even in cases under the general jurisdiction of the court such rulings do not constitute the exclusive measure of the rights of a party dealing with the Government; much less do they so when the reference is under a special act.

This court has decided a number of cases on appeal from the Court of Claims where cases have been referred to that court by special acts, and has always held that the passage of such an act is a waiver of mere technical estoppels. This was notably the case in *Roberts* v. *United States*, 92 U. S. 41. So too, in *United States* v. *Steever*, 113 U. S. 747, it was held that the act reopened payments of prize money previously made, and authorized the court to allow to each captor such a sum as, together with the sum formerly paid him, would equal his lawful share of prize money.

Again in *Briggs* v. *United States*, 143 U. S. 346, it was held that a special act referring a claim for cotton captured during the civil war to the Court of Claims must be regarded as having been passed in view of well-known facts and to authorize and require that court to give judgment for whatever amount of cotton was shown to have been taken from him.

In the present case, Congress must be presumed to have known that the departmental rulings did not permit the appellant to receive the fees and commissions on the sale of these lands which he claimed as additional to the regular duties imposed upon him by law. It seems little better than a mockery for Congress to refer him to the Court of Claims only to be turned out of that

court by the suggestion that the very rulings which prevented him from obtaining payment are conclusive and can not be questioned.

These Lands Treated as Trust Lands.

The remarks which we have made have special reference to the objections made in the opinion of the Court of Claims. We now desire to show that the lands in question in this case have been thruout treated as trust lands.

Article 2 (Petition, Record, foot p. 2) provides "Which land is to be held in trust for said Indians."

Also (top p. 3)—

"The proceeds of such sales, as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians," etc.

The instructions given to the land officers December 19, 1867 (Record, p. 89), require the commission of one per cent wherever it was paid "to be made by the receiver in his capacity of disbursing agent and to be debited in a special account together with the other expenses," etc.

And the instructions of March 28, 1871, provide that receivers "will then charge the Indian fund only so much commissions as will bring their compensation to the maximum" (p. 10), thus distinguishing between "the Indian fund" and "the receipt from public lands" referred to in the previous part of the same instructions.

In 1880 it was decided by Congress that the 16th and 36th sections included in both the ceded lands and the trust and diminished reserve lands were not subject to the reservation of those sections made in the act of January 29, 1861, admitting Kansas into the Union (Sec. 3, Par. 1, 12 Stat. L. 127), on the ground that "a trust

was created for the disposal of the lands of said Indians in the State of Kansas." These words are in the preamble to the act of June 16, 1880, entitled "An act to carry into effect the second and sixteenth articles of the treaty between the United States and the Great and Little Osage Indians proclaimed January 1, 1867" (21 Stat. L. 291). The body of the act repeatedly refers to "the trust for the sale of these lands," "said trust," and "said trust funds." Although the title of the act only refers to the second and sixteenth articles of the treaty, the proviso at the close of the act (p. 292) applies the same principle to "Osage lands ceded by the first article of the treaty aforesaid."

It can be said of these lands precisely what this court said of the lands involved in the *Brindle* case (110 U. S. 693):

"In equity, under the operation of the treaties, the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust. Of this we have no doubt. The treaties are full of evidence to that effect."

Commissions on Ceded Lands.

Some question was raised in the court below whether the lands ceded to the United States by the first section of the treaty, Indian Treaties 1873, p. 585, article 1, lines 26187 to 26201, can be regarded as trust lands, or were public lands of the United States. The terms of the treaty clearly establish a trusteeship on the part of the United States to sell these lands and dispose of the proceeds in a certain way specifically provided in the agreement.

And of these proceeds the United States were not to receive one dollar of benefit. It was provided that "said lands shall be sold as public lands are surveyed and sold under existing laws," not as *other* public lands are sur-

veyed and sold, which is the usual language used in opening military and Indian reservations to settlement. Again, "no pre-emption claim or homestead settlement shall be recognized," neither were they to be sold at public auction, nor could they be acquired by bounty or military land warrants or under the timber culture act, which are the several methods of acquiring title to public lands.

"The words 'public lands,' used in our legislation, mean such as are subject to sale or other disposal under general laws." (*Newhall* v. *Sanger*, 92 U. S. 761).

In the case of *Leavenworth, Lawrence and Galveston Railroad Company* v. *United States* (92 U. S. 733) the status of these Osage lands is fully considered.

The court says:

"The legislation which reserved them for any purpose excluded them from disposal in the manner that the public lands are usually disposed of."

Again the court quotes from the case of *Wilcox* v. *Jackson* (13 Pet. 498) as follows:

"We go further and say that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation were made of it."

The court continues:

"By the first article the Osages ceded to the United States a large and valuable part of their possessions on certain conditions to be performed by the United States. They were required to survey and sell it on the most advantageous terms for cash in conformity with the system then in operation for surveying and selling the public

lands, with the modification that neither pre-emption claims nor homestead settlements were to be recognized. And the proceeds of these sales, after deducting enough to repay large advances and expenses, were to be placed in the Treasury to the credit of the civilization fund, for the benefit of the Indian tribes throughout the country.

"The fund arising from the sale of the lands ceded by the second article was for the exclusive benefit of the Osages, but the relation of the United States to the property in each case is the same. And it can make no difference that the trust in one is specifically declared, and in the other is to be ascertained from the general scope of the language. It is an elementary principle that no particular form of words is necessary to create a trust. In neither case is the Government a beneficiary. In both, the money is to be applied to promote the well-being of the Indians, an object which it has been the favorite policy of Congress to promote."

It was ably but unsuccessfully urged by the Attorney-General in the *Brindle* case (Brief for United States, No. 216, October Term, 1883, p. 19):

"The terms of cession were absolute, and without condition precedent, except as to a particular tract mentioned in article 3 of the treaty with the Delawares of May 6, 1854.

"By these treaties the Indian title to said lands vested immediately, and, except as to the tract mentioned in said article 3, unreservedly in the United States.

"By the fulfillment by the United States of the condition mentioned in said article 3, the Indian title to the particular tract mentioned in said article was also finally extinguished.

"Said treaties provided that the ceded lands should be surveyed and sold in a particular manner, and that the net proceeds thereof should be applied in a particular manner to the benefit of said Indians."

But this argument was answered by this court (p. 693): "The cessions to the United States were in trust, to sur-

vey, manage and sell the lands and pay the net proceeds to or invest them for the Indians." The same is true in this case.

From the foregoing we are justified in the conclusion:

1. That "the treaty of 1825 secured to the Osages the possession and use of their lands as long as they may choose to occupy the same." "This right of occupancy has been held to be as sacred as the title of the United States to the fee." (*L. L. & G. R. R.* v. *U. S.*, 92 U. S. 733).

2. That the Government relinquished all reversionary right by the treaty of September 29, 1865, by providing for their sale, the proceeds of which were for the exclusive use of the Indians.

3. That the Government was charged with the trust of surveying and selling said lands and placing in the Treasury of the United States the money received from such sale, less the cost of survey and sale.

4. That by the terms of the original grant of these lands to the Indians and subsequent treaty providing for their sale for their benefit, both classes of these lands became the private lands of the Indians and ceased to be public lands.

Services Outside of Statutory Duties.

In the case at bar the question is:

"Was claimant justly, legally, or equitably entitled to additional compensation for selling a certain part of these lands while performing his duties as register of the land office in assisting in the disposal of the public lands?"

The duties of a register of a land office refer exclusively to disposing of the public lands of the United States. There was not one sentence or one word in all the legislation relating to any officers charged with duties pertaining to the disposal of the public lands that could in

any manner be legally construed to require him to assist in disposing of private lands prior to the act of January 27, 1898.

The General Land Office and local land offices were established for the exclusive purpose of executing laws relating to the public lands.

"There shall be appointed by the President, by and with the advice and consent of the Senate, a register of the land office and a receiver of public moneys for each land district established by law." (R. S. 2234.)

"Every register and receiver shall be allowed an annual salary of five hundred dollars." (R. S. 2237.)

"Registers and receivers, in addition to their salaries shall be allowed each the following fees and commissions." (R. S. 2235.) The fees and commissions enumerated and allowed relate entirely to the public lands, and they were only charged with such duty until January 27, 1898 (30 Stats. 234), when they were further charged with the duties of assisting to dispose of Indian lands as follows:

"*Be it enacted*, etc., That section twenty-two hundred and thirty-four of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Section 2234. There shall be appointed by the President, by and with the advice and consent of the Senate, a register of the land office and a receiver of public moneys for each land office established by law, who shall have charge of and attend to the sale of public and Indian lands within their respective districts, as provided by law and official regulations, and receivers shall be accountable under their official bonds for the proceeds of such sales and for all fees, commissions or other moneys received by them under any provision of law or official regulations."

This is certainly conclusive that it was not a part of the duties of the registers and receivers under the law, to

assist in the disposal of the Indian lands prior to the date of this act, for, otherwise, there would be no necessity for this amendment. The intent and purpose of Congress is clearly shown and this becomes final.

In the case of *United States* v. *Macdaniel*, 7 Pet. 1, it was held:

"That the duties in question were discharged by the defendant during office hours can form no objection to the compensation claimed. They were required of him by the head of the Department and being a subordinate he had no discretion to decline the labor and responsibility thus imposed. But seeing that his responsibility would be greatly increased, and perhaps his labor, the Secretary of the Navy increases his compensation, as in justice he was bound to do.

"In discharging the ordinary duties of clerk, the compensation of the defendant was fixed as fourteen hundred dollars; but when the duties of agent for Navy disbursements were superadded to those of clerk, there is an adequate augmentation of pay given to him. Is there anything unreasonable or unjust in this?

"But it is said there was no law authorizing such an officer to be appointed.

"That the duties performed by the defendant were necessary for the public service has not been denied; nor is it pretended that the commissions allowed him were higher than the amount paid for similar service elsewhere. The payments by him were legal and being made under the immediate direction of the Secretary of the Navy errors were avoided which might have occurred under other circumstances.

"It must be admitted that there was no law authorizing the appointment of the defendant, nor was it considered necessary that there should be a special statutory provision on the subject. For the convenience of the officers of the Navy and others who were engaged in the service of the Department, certain disbursements became necessary; and as no law specially authorized the appointment of an agent for this purpose, they were required to be made by a clerk."

By substituting claimant for defendant in the above case last cited, we have every principle adjudged for which claimant contends. It is not important that claimant performed this service during office hours; "They were required of him by the head of the Department," and in the case at bar Congress provided for compensation, but it was, in effect, overruled by the Commissioner of the General Land Office. In fixing the maximum salary at $3,000 (Rev. Stat. Secs. 2240, 2241) Congress had in view only his services for disposing of the public lands, the only service contemplated, but when the duties of selling the private lands of Indians "were superadded" to those of disposing of the public lands, there should be "an adequate augmentation of pay given him." "Is there anything unreasonable or unjust in this?" The law authorized claimant's employment. His duties were necessary for the public service; he only asks compensation upon the basis "for similar service elsewhere."

Payment of Expenses Required by Treaty.

The treaty itself provided for such compensation. Article 1 providing for the sale of the "ceded lands," stipulated that "after reimbursing the United States the cost of said survey and sale * * * the proceeds of sale shall be placed in the Treasury of the United States to the credit of the civilization fund."

Article 2, as to the "trust lands" provides:

"The proceeds of sale, as they accrue, after deducting all expenses incident to proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians."

Article 16 as to the "Osage diminished reserve lands" provides:

"The diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to the trust lands."

The "cost of survey" was paid by direct appropriation to fulfill contracts and the only "cost of sale" that was or could be incurred was compensation to the registers and receivers.

It was said by the Supreme Court of provisions in the same form in the *Brindle* case (110 U. S. 693):

"This clearly implied the payment of a reasonable compensation for the services of those employed to carry the trust into effect."

The First Controller of the Treasury decided July 6, 1881, that no fees or commissions could be paid to registers or receivers out of the proceeds of sale of these lands in the absence of an appropriation. (2 Lawrence, 369.)

The Second Controller of the Treasury decided December 4, 1886, that the fees of one dollar provided by the first paragraph of section 2238 of the Revised Statutes as a fee for the register can not be regarded as a part of the proceeds of the sales of the lands, but are in the nature of a tax imposed by the United States upon persons purchasing the land for the purpose of imdemnifying the Government for the expense of maintaining such service, and that they must be credited in making up the expense account of the United States, and that only the net expenses remaining after applying these fees can be charged to the Osage Nation and deducted from the proceeds of the sale of their lands. (Digest 2d Cont. Dec. Vol. 3; Secs. 722, 723, pp. 186, 187.)

As the filing fees exceeded the expense to which the United States had been put, no charge for expense in the

sale of these lands has ever been made against the Osage Indians (Sen. Doc. 33, 57th Cong. 2d Sess. p. 3).

The provisions of these three articles of the treaty, therefore, requiring the expenses of the sale to be charged against the proceeds have never been carried out. The payment of a reasonable compensation to officers employed to make the sales is therefore not merely an implication arising out of the treaty as the Supreme Court said in the *Brindle* case, but is the only expense to which the requirements of the treaty can possibly have any application.

Presumptions in Favor of Officer.

Every presumption must be in favor of the payment of the officers performing this additional work out of the funds of the Indians for whose benefit the work was performed. It is not to be presumed that the treaty-making power, while inserting in the treaty a provision for payment of the expenses of the sale, intended that the treaty funds should escape the payment of all such expenses through the operation of a provision for the payment into the Treasury of the excess of the emoluments earned by the land officers in the performance of the regular duties of their offices. Such a provision was intended to operate under very different circumstances from those of the present case. Its purpose was to save the money of the Government itself, not trust funds.

Justice Story, in *United States* v. *Bassett* (2 Story, 389, 24 Federal Cases, No. 14,539, pp. 1030, 1034), thus expressed the principle governing such cases:

"Such a mode of legislation so little supported by principles of justice or equity ought certainly not to be adopted, unless the legislature has spoken in the most clear and unambiguous terms. If there be any ground for real substantial doubt, as to the correctness of such an interpretation, that alone would seem to repel it; for

it is not in matters of doubt to be admitted that the legislature requires duties and services from a public officer, and yet intends to take from him the compensation which it has itself deemed a fit compensation therefor under ordinary circumstances. Besides, the act itself is restrictive of the right of the officers to all the fees and emoluments of their office, generally allowed by law, cutting down and limiting the compensation to a fixed maximum, and appropriating the residue to the public treasury. Now, in such cases, the general rule of interpretation is to give effect to the restriction and limitation only so far as the legislature has clearly and positively spoken, since it is in derogation of private rights otherwise vested in the incumbent in office. We can not, and we ought not, in such a case, to say, 'Voluit, sed non dixit,' for the intention can be fitly gathered only from the words, and therefore it is but just to say, 'Non voluit, quia non dixit.'"

And similar views were expressed by the same great magistrate in *United States* v. *Morse*, 3 Story, 87; 27 Fed. Cases, No. 15,820, pp. 1–3. He there said:

"The law, as I conceive, adjusts or intends to adjust, the measure of the compensation of every officer to the duties to be performed in that office, and not in another independent office."

And in much the same line of reasoning this court held in *United States* v. *Hill* (120 U. S. 169) that clerks of the Circuit and District courts were not required to account in their emolument returns for anything but taxable cost in suits between party and party, and that they were entitled in addition thereto to receive, irrespective of any maximum of emolument, the fees in proceedings under the naturalization laws and under the Shipping Commissioner's act, as well as the fees for the admission of attorneys to practice.

The present is a stronger case than either the *Bassett*, *Morse*, or *Hill* case for an exclusion of the charges for these special services from the requirement for an inclusion in the emolument return.

Amount of Compensation.

While the question of the amount of this additional compensation does not directly arise on this appeal, it may be remarked that the decision of this court in the *Brindle* case in fact allowed the officer his commissions at the rate of one per cent on all sales of Delaware Indian trust lands without regard to the maximum limit prescribed by the statute upon sales of public lands.

In that case the very point made against the allowance of the claim was that the claimant had already received his full maximum compensation, all of which seems to have been paid out of Indian lands.

It was found (Brief for United States in the *Brindle* case, pp. 8, 9):

"That while the defendant was acting as special receiver of Delaware Indians trust-land moneys he received for the sale of such lands the sum of $467,749.19.

That commissions on said sum, at one per centum, would amount to the sum of . .	$4,677.49
That he was allowed for commissions on said sum	2,500.00
That he was disallowed the sum of	2,177.49
Which, with the sum of	142.27
makes	$2,319.76
That the interest on said sum of $2,319.76, from March 23, 1857, to June 13, 1879, makes the sum of	3,092.85
Making together the sum of	$5,412.61

15. That, while the defendant was acting as special receiver of Kaskaskia and Peoria, Piankeshaw and Wea Indians trust-moneys, he sold 208,656 30/100 acres of land, for which he received the sum of $347,852.74.

That the commissions on said sum, at one per centum, amounts to	$3,478.53
That he was allowed for commissions on said sales	2,500.00
That he was disallowed the sum of	978.53
That the interest on said sum so disallowed, from May 6, 1861, to June 13, 1879, amounts to	1,062.84
Making in all	$2,041.37

That the sum of	$978.53	
the amount so disallowed, deducted from the sum of	2,073.77	
Leaves the sum of		1,095.24
That the interest on this sum of $1,095.24 from May 6, 1861, to June 13, 1879, amounts to		1,189.61
Which together amounts to the sum of		$2,284.85."

The special verdict found (Brief for the United States, p. 13):

"G. If the court be of the opinion that the First Comptroller of the Treasury was the proper officer authorized by law to state the accounts of defendant as receiver of public moneys, and as acting disbursing agent, and that the Second Comptroller of the Treasury was the proper officer authorized by law to state the account of the defendant as special receiver of Indian trust moneys, and that the defendant is entitled to commissions on the sales of Indian trust lands exceeding the sum of $2,500 for each sale of said lands, and that he is not entitled to military bounty-land-warrant fees exceeding $2,500 per year, including commissions on cash sales of public lands, then

the jury find for the defendant, and certify the amount due him to be the sum of $6,616.27
With interest to June 13, 1879, amounting to 7,925.51

Making in all . . . . . $14,541.78."

It was this paragraph of the special verdict which was approved and made the basis of the judgment. It expressly states that the defendant is entitled to the commissions on the sales of Indian trust lands "exceeding the sum of $2,500 for each sale of said lands," that is, exceeding the maximum limitation prescribed by Revised Statues, Sections 2240, 2241, on sales of regular public lands. This point, therefore, like the other objections, is clearly met by the decision in the *Brindle* case.

Conclusion.

The judgment of the Court of Claims should therefore be reversed and the cause remanded with directions to give judgment in favor of the appellant for such an amount as would constitute a reasonable compensation for his services in the disposition and sale of these Indian trust lands.

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